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United States Department of the Interior

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IN REPLY REFER TO:

D5639

DSC CONTRACTING SERVICES GUIDELINE 2006-006

To: Denver Service Center, Contracting Services Division

From: Chief, Denver Service Center, Contracting Services Division

Subject: GENERAL GUIDELINE: Substantial Completion vs. Beneficial Occupancy in Construction Contracts

1. **Purpose:** The purpose of this guideline is to provide discussion of and guidance to the Denver Service Center, Contracting Services Division (DSC-CS) on the use of substantial completion and beneficial occupancy in contracts for construction.
2. **Effective Date:** This guideline is effective upon issuance.
3. **Expiration Date:** This guideline remains effective unless superseded or canceled.
4. **Legal Authorities:**
 - FAR Clause 52.246-12 Inspection of Construction
 - FAR Clause 52.211-12 Liquidated Damages – Construction
 - FAR Clause 52.232-05 Payments Under Fixed-Price Construction Contracts
 - FAR Clause 52.236-11 Use and Possession Prior to Completion
 - FAR Clause 52.236-07 Permits and Responsibilities
 - FAR Clause 52.246-21 Warranty of Construction
 - DIAR Clause 1452.204-70 Release of Claims – Department of Interior

During the course of any construction project, prior to final acceptance of the project, there comes a point when the Government may do one of two things:

1. Take and use the work prior to completion and when the use is over, return the work to the contractor for completion (temporary beneficial occupancy); or,
2. Take and use the work prior to completion and when the use is over, not return it to the contractor (beneficial occupancy).
3. All major components that make up the project are complete and the project is functional for its intended use (substantial completion).

Under either 1 or 2, while the Government has possession or use of the work, the Contractor is relieved of the responsibility for the loss of or damage to the work resulting from the

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Government's possession or use, except for warranty coverage on accepted work. In both situations the Government furnishes the Contractor with a list of items of work remaining to be performed or corrected on those portions of the work that the Government intends to take possession of or use. This said, the Contractor is still required to comply with the terms of the contract, and neither condition constitutes Government acceptance of the work. Additionally, under either 1 or 2, liquidated damages would not be applicable as the project is not substantially complete.

Government acceptance is typically referred to as final acceptance, not to be confused with substantial completion. It is very important to understand that substantial completion is an event, i.e., the work becomes substantially complete or the Contractor achieves substantial completion. The work can be considered substantially complete even if the Government does not take possession of or occupy the work. On the other hand, because the Government may use a portion of the work prior to completion, this use does not necessarily represent that the work is substantially complete. The term "beneficial occupancy" is commonly used to describe the Government's taking over of a portion of the work with the intent of later returning it to the contractor.

An example of such beneficial occupancy would be where the contractor has completed three of eight comfort stations contained in the entire project. The Government wants to use the three comfort stations prior to its acceptance of the remaining five comfort stations, which won't occur for an additional four months. The Government could take beneficial occupancy of the three comfort stations only, even though the entire project is not substantially complete. The warranty period on those three comfort stations would commence on the date of beneficial occupancy. The warranty period on the remaining five comfort stations would commence on the date of substantial completion.

If the Government takes possession of a portion the work with the intent of returning it to the contractor, the term "temporary beneficial occupancy" should be used. An example of such would be the Government intends to use the Yavapai Observation Station on Memorial Day weekend for a special event with the intent of returning the building to the contractor on the following Tuesday. The warranty period would not start since the Government intends to return the building to the contractor. In lieu of temporary beneficial occupancy, the Government could instead have taken beneficial occupancy of the interior of the building, in which case the warranty period would begin but would only apply to the interior of the building. In both instances, the project would not be considered substantially complete until all of the remaining work on the exterior of the building and site work had been completed.

Under Government construction contracts, the authority to take and use part or all of the work is the FAR clause 52.236-11 -- Use and Possession Prior to Completion. Under any condition of use or possession-whether substantial completion or beneficial occupancy, the Government must perform a detailed inspection of the work, listing all observed deficiencies, and furnish a copy of the inspection to the contractor (see definitions of Punch List and List of Deficiencies). The Government's copy of the punch list or list of deficiencies should include an accurate estimate of the cost to complete the work in the event the contractor fails to complete the work and the work has to be completed by others. The priced list of deficiencies or punch list shall be used as the basis for withholding retainage from payments to the contractor. Legal counsel advises against sharing the priced list of deficiencies or priced punch list with the contractor.

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The letter transmitting the list of deficiencies or punch list to the contractor should state clearly whether the listing is a simply a list of deficiencies, a beneficial occupancy punch list, or a substantial completion punch list. The letter should also state an actual date or number of days during which all items on the list are completed.

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